Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH JASPAN, ROBERT A. SASSO, MICHAEL CARBONE, ANDREW BOGGIA, JACK DEE, ALFRED FINKEL, THEODORE KING, CHESTER BROMAN, and JOHN QUADROZZI, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds,

Petitioners,

vs.

GLOVER BOTTLED GAS CORPORATION and SYNERGY GAS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is an employer who makes contributions pursuant to a collective bargaining agreement to an ERISA-covered trust fund that provides benefits to its employees bound as a matter of law to the terms and conditions of the trust agreement governing the administration of the trust fund, even though the employer has not signed the trust agreement?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. Upon information and belief, there are no parents or subsidiaries of any party to be listed.

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JOSEPH JASPAN, ROBERT A. SASSO, MICHAEL CARBONE, ANDREW BOGGIA, JACK DEE, ALFRED FINKEL, THEODORE KING, CHESTER BROMAN, and JOHN QUADROZZI, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Joseph Jaspan, Robert A. Sasso, Michael Carbone, Andrew Boggia, Jack Dee, Alfred Finkel, Theodore King, Chester Broman, and John Quadrozzi, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds,[1] respectfully petition for a writ of certiorari to

[1] The current Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds are Gary LaBarbera, Lawrence Kudla, Dennis Gartland, Robert Haesecker, Chester Broman, Joseph Ferrara, Frank Finkel, and Theodore King.

review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 80 F.3d 38 (2nd Cir. 1996), and is reproduced in the Appendix annexed hereto at page A-1. The unreported Amended Order of the United States District Court for the Eastern District of New York (Dearie, J.) is reproduced in the Appendix annexed hereto at page A-11.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 18, 1996. The jurisdiction of this Court to review the judgment in question on a writ of certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

The following provisions of the Employee Retirement Income Act of 1974, as amended, are involved in the case: Section 1(a), 29 U.S.C. § 1001(a); Section 103(a)(3)(A), 29 U.S.C. § 1023(a)(3)(A); Section 209(a)(1), 29 U.S.C. § 1059(a)(1); Section 209(b), 29 U.S.C. § 1059(b); Section 402(a)(1), 29 U.S.C. § 1102(a)(1); Section 403(a), 29 U.S.C. § 1103(a); Section 403(c), 29 U.S.C. § 1103(c); Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B); Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); Section 1106(a), 29 U.S.C. § 1106(a); Section 1106(b), 29 U.S.C. § 1106(b); Section 407(a)(1), 29 U.S.C. § 1107(a)(1); Section 407(a)(2), 29 U.S.C. § § 1107(a)(2); Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

The relevant text of these provisions is set out in the Appendix annexed hereto at page A-13.

STATEMENT OF THE CASE

Petitioners are the Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds (the "Funds"). The Funds provide retirement and health benefits to employees of various employers who make contributions to the Funds pursuant to collective bargaining agreements with Building Material Teamsters Local 282 ("Local 282"). The Funds are administered by the Trustees in accordance with the terms of the Trust Agreement and rules promulgated by the Trustees pursuant to their authority under the Trust Agreement, and in accordance with the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq*.

Respondent Glover Bottled Gas Corporation (now known as Synergy Gas Corporation) ("Glover") was a signatory to collective bargaining agreements with Local 282, effective March 1, 1977 through July 31, 1979, and August 1, 1979 through July 31, 1982. Pursuant to these agreements, Glover was obligated to make contributions to the Local 282 Pension Trust Fund at set rates. In addition, in accordance with the requirements of the Trust Agreement[2], Glover submitted monthly remittance reports to the Funds from March 1977 through September 1983. These reports set forth the hours worked by employees in covered employment and the corresponding contribution obligations of Glover to the Funds.

Pursuant to Sections 103 and 209(a)(1) of ERISA, 29 U.S.C. §§ 1023 and 1059(a)(1), as well as the Trust Agreement[3], the Funds conduct periodic audits of participating employers to ensure that the appropriate contributions are being

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[2] The Trust Agreement, Article VI, Section 1(c), states as follows: "Detailed written reports shall be submitted to the Trustees by the Employers together with each payment, the said reports to be in such form as may be requested from time to time by the Trustees."

[3] The Trust Agreement, Article VI, Section 1(c), states: "The Trustees may at any time audit the pertinent books and records of any Employer in connection with" remittance reports.

made in accordance with the various collective bargaining agreements. Pursuant to the Trust Agreement, employers who submit remittance reports and pay contributions--but fail to produce records for audit purposes--are required to pay to the Funds an additional amount equal to 50% of the contributions made during the months subject to the attempted audit.[4]

On or about June 7, 1985, the Funds commenced this action in the United States District Court for the Eastern District of New York under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, to compel Glover to comply with the Funds' demand that Glover produce its books and records for audit purposes, and for appropriate legal and equitable relief. This action was prompted by Glover's position that it would not produce its books and records to the Funds without a court order.

On November 11, 1988, the Funds moved for summary judgment to compel Glover to produce the records and comply with the audit demand of the Funds. In its papers opposing the Funds' motion, Glover argued for the first time that the Funds' action was "made moot by the fact that the documents that are the focus of plaintiff's motion cannot be located by defendants after a diligent search."

On December 16, 1988, at a hearing in connection with the Funds' summary judgment motion, Judge Raymond Dearie stated that in the event that Glover failed to produce the payroll records, the Funds, in accordance with the Trust

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[4] The Trust Agreement, Article VI, Section 1(e), states as follows: "In the event the employer submits the required remittance reports, but thereafter such employer fails to submit the pertinent books and records for audit within 20 days after written demand, such failure shall be a material breach of the Collective Bargaining and Trust Agreements. In such event the Trustees or their agents may compute the additional contributions due for any month by taking 50% of the number of hours reported for that month and then multiplying said number of hours by the current contribution rate."

Agreement, would be entitled to an amount equal to 50% of the contributions paid by Glover during the audit period. Judge Dearie then granted the Funds' motion but stayed entry of judgment for thirty days to permit Glover to make "a last effort to find the records." Judge Dearie further indicated that if the records were not produced, the order would require Glover to pay the amount requested by the Funds in accordance with the Trust Agreement.

On or about January 9, 1989, Glover advised the court that it had managed to locate some but not all of the requested records. The court granted Glover's request for a further stay of the entry of judgment to permit the Funds' auditor to review the records Glover was now prepared to produce. The Funds were unable to complete the audit based on the records offered by Glover.

Because of their inability to complete the audit, the Funds moved for entry of judgment in accordance with Judge Dearie's prior ruling. Based on the 50% formula contained in the Trust Agreement, the Funds repeated their request that judgment be entered in the amount of $43,130.67, covering the six-year period ending with the Funds' demand for an audit on October 9, 1984. Glover opposed the motion on the ground, *inter alia*, that it was not a signatory to the Trust Agreement, and therefore not bound to it.

On January 5, 1995, Judge Dearie issued an order granting the Funds summary judgment with respect to the Funds' demand that Glover be required to produce records for an audit, but denying the Funds' request that the 50% formula contained in the Trust Agreement be applied to Glover. (A-11 *et seq.*[5]) Judge Dearie wrote that there was no "support for the proposition that the Court has the power to order a non-signatory to a trust agreement to pay `damages' to plaintiffs for violation of record-keeping obligations. The only monetary sanction ERISA authorizes for the violation of such

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[5] The citation "A-__" refers to pages of the Appendix annexed hereto.

obligations is the $10 per employee civil penalty provided for in 29 U.S.C. § 1059." (A-11-12)

In referring to Glover as "a non-signatory to a trust agreement," Judge Dearie did not address the Funds' argument that by making contributions to the Pension Fund, Glover was bound as a matter of law by the rules of the Trust Agreement.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's decision. (A-1 *et seq.*) In doing so, the Second Circuit held that Glover, despite being a contributing employer to the Funds, was not bound by the rules contained in the Trust Agreement. (A-6) The court rejected contrary holdings of the Eleventh Circuit Court of Appeals in *Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Construction Company, Inc.*, 932 F.2d 1443 (11th Cir. 1991), and the Ninth Circuit Court of Appeals in *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corporation*, 920 F.2d 1491 (9th Cir. 1990) *cert. denied*, 501 U.S. 1232, 111 S. Ct. 2855 (1991), on the ground that those cases centered on rules relating to the right of a benefit fund to conduct audits of contributing employers. (A-6-8) The Second Circuit also found that the Eleventh Circuit's decision in *Vertex* was inapposite because it relied on the terms of the trust agreement in that case, which purported to cover any contributing employer, regardless of whether such an employer had signed the trust agreement. The court contrasted the language of the trust agreement in *Vertex* with the text of the Funds' Trust Agreement, which defines "Employer" as a "signatory" to the Trust Agreement or one who "agrees to be bound by the terms and provisions of [the Trust] Agreement."[6] (A-8-9)

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[6] The Trust Agreement, Article I, Section 1, defines "Employer" as follows: "The term `Employer' as used herein shall mean each employer who has duly executed a collective bargaining agreement with the Union and who is a signatory to this agreement, and also any employer not presently a party to such collective bargaining agreement who hereafter executes such agreement provided that such employer satisfies the requirements for participation as established by the Trustees and agrees to

(Footnote continued)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Second Circuit's decision poses substantial dangers to the purposes and foundation of ERISA. In holding that an employer who contributes to benefit trust funds may avoid being bound to the terms of the governing trust documents, the Second Circuit failed to recognize one of the most fundamental principles of ERISA, namely, that trustees of a benefit fund have plenary power and the fiduciary duty to enforce the obligation of employers to pay contributions.

The Second Circuit's decision clearly stands in opposition to several of this Court's holdings that have defined the duty of ERISA fiduciaries to protect beneficiaries, as well as their *power* to fulfill this duty by promptly collecting contributions from employers. Particularly in *NLRB. v. Amax Coal Company, A Division of Amax, Inc.*, 453 U.S. 322, 101 S. Ct. 2789 (1981) and *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 105 S. Ct. 2833 (1988), this Court has set forth the obligations of benefit fund trustees under ERISA to identify beneficiaries, to discover the location of trust property and take control of it promptly, and generally to insulate trust funds from the interest of employers. At the same time, this Court has emphasized that trustees must have all powers necessary to carry out the purposes of trusts, and that trustees are completely independent of both employers and unions, who cannot bargain away trustees' rights.

Finally, a writ should also be granted because the Second Circuit's decision conflicts squarely with the holdings of the Ninth and Eleventh Circuits, who concluded that by making contributions to trust funds, employers avail themselves of the benefits of those funds, and must therefore be subjected to fund rules.

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be bound by the terms and provisions of this Agreement and Declaration of Trust, and becomes a party hereto."

The significance of this issue cannot be overstated. If an employer who has not signed a trust agreement can eviscerate the powers of trustees, those trustees cannot perform their statutory and fiduciary duty to protect plan participants and beneficiaries. In short, "the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." Section 1(a) of ERISA, 29 U.S.C. § 1001(a). Indeed, in this case, the Funds would be left powerless to take action against an employer who refused or was unable to supply records for audit. Of course, it was to avoid such danger that Congress enacted ERISA. The Second Circuit's decision is simply inconsistent with the role afforded by ERISA to trustees in the private pension arena. Accordingly, this Court should issue a writ of certiorari and review the Second Circuit's decision.

I

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRIOR RULINGS WITH RESPECT TO THE DUTIES AND POWERS OF BENEFIT PLAN TRUSTEES UNDER ERISA

In holding that Glover, as a non-signatory, was not bound by the Funds' Trust Agreement, the Second Circuit failed to acknowledge one of the most essential principles of ERISA, as elaborated by a long line of decisions of this Court. The Second Circuit's holding countenanced Glover's position that its sole responsibility to the Funds was to pay the contributions it claimed it owed under its contractual obligation to Local 282, on the ground that the obligation to pay contributions was the only one set forth in Glover's collective bargaining agreement with Local 282. In arriving at this decision, the Second Circuit made two significant errors. First, it failed to recognize that by agreeing to pay contributions to the Funds, Glover necessarily bound itself to the Trust Agreement governing the Funds. Second, the court implicitly accepted Glover's position that through its contract with Local 282, it could limit the rights of the Funds' Trustees.

Above all, what the Second Circuit refused to recognize is that Glover's contractual promise to pay contributions was not a promise upon which the Funds could rely. Rather, ERISA imposed a stringent obligation on the Funds to make sure that Glover did what it had promised to do, so that beneficiaries and participants of the Funds would receive the benefits to which they were entitled. Under ERISA, the Trustees of the Funds not only were assigned the burdensome duty of ensuring that all contributions were collected promptly, but were given the plenary power to fulfill this duty. It was this power that the Second Circuit denied the Funds.

The Second's Circuit's holding ignores the historical underpinnings of ERISA. In 1974, ERISA was enacted in recognition of the extraordinary significance of the private pension system:

> The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.

H.R. Rep. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted* in 1974 U.S.C.C.A.N., 4639, 4640. Of course, the most important feature of private pension plans considered by Congress was their role in providing benefits to employees, as "the continued well-being and security of millions of employees and their dependents are directly affected by the plans." 29 U.S.C. § 1001(a). In 1974, thirty million employees were covered by pension plans, with $150 billion in assets set aside to cover benefits credited to participants. House Report 533, *reprinted* in 1974 U.S.C.C.A.N. at 4641. By the 1990s, there were nearly 900,000 pension and benefit plans providing coverage to over seventy-six million employees. These pension plans post assets today in excess of $1.7 trillion, and experts predict that number will increase to $3 trillion by the end of the century. Craig W. Trepanier, *Trading Places: Employer*

Strategies to Avoid Mandatory Awards of Interest, Liquidated Damages, and Attorney's Fees Under the MPPAA, 78 Minn. L. Rev. 229, 232 n. 16 (1993); J. Daniel Plants, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy To Prevent Unjust Enrichment*, 89 Mich. L. Rev. 2000 n. 2 (1991).

Congress enacted ERISA after "almost a decade of studying the Nation's private pension plans." *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726 (1980). One of ERISA's chief purposes was to remedy "the inadequacy of current minimum standards," as a result of which "the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." 29 U.S.C. § 1001(a).

Congress found serious shortcomings in the mechanisms in place to protect beneficiaries prior to the enactment of ERISA. The Internal Revenue Code provided "only limited safeguards." The LMRA did not establish detailed standards. Even the Welfare and Pension Plans Disclosure Act of 1958 was inadequate, as "[i]ts chief procedural weakness can be found in its reliance upon the initiative of the individual employee to police the management of his plan." House Report 533, *reprinted* in 1974 U.S.C.C.A.N. at 4642-4643.

Against this backdrop, ERISA shored up "minimum standards," and placed the onus for fulfillment of these standards on benefit fund fiduciaries, in particular trustees, rather than on the covered employees or any other party. However, Congress was deeply concerned about the historical record of plan fiduciaries:

> Of particular interest has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension 'fiduciaries,' and the standards of accountability they shall be governed by in the management and disposition of pension funds.

House Report 533, *reprinted* in 1974 U.S.C.C.A.N. at 4645.

As this Court has stated, "ERISA essentially codified the strict fiduciary standards" that trustees were supposed to meet under Section 302(c)(5) of the LMRA. *Amax*, 453 U.S. at 332, 101 S. Ct. at 2795. This codification had two components. First, ERISA imposed specific duties on trustees, as will be discussed below. Second, "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Central Transport*, 472 U.S. at 570, 105 S. Ct. at 2840.

Consistent with the common law of trusts, ERISA plan fiduciaries are held to strict standards of loyalty and care. Pursuant to the standard of care, trustees must discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Under the standard of loyalty, a fiduciary must act "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries."[7] 29 U.S.C. § 1104(a)(1)(A).

By invoking the common law of trusts, ERISA imposed certain basic duties on trustees to protect participants and beneficiaries, as this Court has explained:

> One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets, Bogert § 582, at 346, and this encompasses "determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries." *Id.*, § 583, at 348 (footnotes omitted). The trustee is thus expected to "use reasonable diligence

[7] Fiduciaries are also held responsible for "defraying expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

> to discover the location of the trust property and to take control of it without unnecessary delay." *Id.*, at 355. A trustee is similarly expected to "investigate the identify of the beneficiary when the trust documents do not clearly fix such party" and to "notify the beneficiaries under the trust of the gifts made to them." *Id.*, at 348-349, n. 40.

Central Transport, 472 U.S. at 572, 105 S. Ct. at 2841. Moreover, many of a trustee's obligations under ERISA not only stem from common-law trust doctrine, but are also explicitly identified in the text of ERISA. For example, as pointed out in *Central Transport*, ERISA's reporting standards--largely found in Sections 101, 102, and 104(b), 29 U.S.C. §§ 1021, 1022, 1024(b)--require benefit plans to provide participants with notice of their rights, "a task that would certainly include the duty of determining who is in fact a plan participant." 472 U.S. at 572, 105 S. Ct. at 2841.

It must be emphasized that the fiduciary duties imposed on trustees of benefit funds by ERISA are in large part designed to "specifically insulate the trust from the employer's interest." *Amax*, 453 U.S. at 334, 101 S. Ct. at 2796. Perhaps the most significant ERISA provision in this respect is Section 403(c)(1), which mandates that with certain exceptions "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

But ERISA goes further. Employers cannot control plan assets for even a short while, as ERISA requires fiduciaries to refrain from transactions constituting "a direct or indirect . . . lending of money or other extension of credit between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(B). ERISA also limits the type and percentage of employer-owned securities or real property that a benefits plan can acquire. 29 U.S.C. §§ 1106(a), 1107. Finally, ERISA contains a broad prohibition against trustees entering into any

transactions "involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2).

Courts have interpreted the provisions described above to require trustees not only to collect contributions from employers, but to do so promptly and vigilantly. In *Central Transport*, this Court explicitly rejected the notion that fund trustees can rely on participants to raise benefit claims:

> Such a suggestion ignores the trustees' fiduciary duty to inform participants and beneficiaries of their rights, to gain immediate use of trust assets for the benefit of the trust, to avoid the time and expense of litigation, and to avoid unfunded liabilities that might eventually prove uncollectible as a result of insolvencies. For a plan passively to allow an employer to create such unfunded liabilities would jeopardize the participants' and beneficiaries' interests as well as those of all participating employers who properly comply with their obligations.

472 U.S. at 580, 105 S. Ct. at 2845. *See also Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917-918 (2nd Cir. 1989).

Just as benefits plan trustees cannot rely on participants to police the payment of contributions, so they cannot look to unions. Unlike trustees of a benefits plan, union officials are properly concerned with the interests of current employees, and thus cannot be expected to look out for the interests, e.g., of retirees. Moreover, unions tend to focus on the interests of the bargaining unit as a whole, while trustees must ensure that specific individuals obtain benefits. *Central Transport*, 472 U.S. at 576-577, 105 S. Ct. at 2843. Nor can trustees rely on the Department of Labor to monitor employer compliance with contribution obligations. While ERISA gives the Secretary of Labor investigatory powers, Congress did not endow the Secretary with the ability to sue to enforce employer

obligations. *Central Transport*, 472 U.S. at 578-579, 105 S. Ct. at 2844.

Finally, making ERISA's requirements even more strict, fiduciaries cannot be excused from their obligation to pay benefits as a result of an employer's failure to make contributions. As the Secretary of Labor has stated, pension plans must pay benefits "solely on the basis of service performed for a participating employer, regardless [of] whether that employer is required to contribute for such service or has made or defaulted on his required contributions." Department of Labor Advisory Op. No 76-89 (Aug. 31, 1976); accord, Department of Labor Advisory Op. No. 78-28A (Dec. 5, 1978). *See also Central Transport*, 472 U.S. at 567 n. 7, 105 S. Ct. at 2838 n. 7; *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989) ("Pension plans believe that their obligations to employees stem from the terms of the participation agreements, and that employers' failure to fulfill their promises is irrelevant").

Of course, it must be pointed out that when an employer does not meet its contribution obligations, other employers, as well as the benefit fund, are adversely affected. As this Court has explained:

> Each of the participating unions *and employers* has an interest in the prompt collection of the proper contributions from each employer. Any diminution of the fund . . . would have an adverse effect on the other participants. The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers . . . (emphasis added).

Schneider Moving & Storage Company v. Robbins, 466 U.S. 363, 373, 104 S. Ct. 1844, 1850 (1984). *See also Lewis v. Benedict Coal Corporation*, 361 U.S. 459, 469, 80 S. Ct. 489, 495 (1960) (if some coal companies curtail contributions, "[u]ltimately this might result in pressures upon the other coal operators to increase their [contributions] to maintain the

planned schedule of benefits"); *Gerber*, 870 F.2d at 1153 ("Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates").

Given the stringent duty imposed on benefit fund trustees vigilantly and expeditiously to collect all contributions owed to a fund, it is no wonder that ERISA vests "exclusive authority and discretion to manage and control the assets of the plan" in the trustees. 29 U.S.C. § 1103(a). These powers are vested "in the trustees alone, and not the employer or the union." *Amax*, 453 U.S. at 333, 101 S. Ct. at 2796. As this Court has also made clear, under the common law of trusts engrafted on to ERISA, "trustees are understood to have all 'such powers as are necessary or appropriate for the carrying out of the purposes of the trust.'" *Central Transport*, 472 U.S. 570, 105 S.Ct. at 2840, citing 3 A. Scott, law of Trusts § 186, p. 1496 (3d ed. 1967).

In exercising these broad powers, trustees must operate benefit plans "pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Of course, the written instrument must be consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D). It should be pointed out that just as the written instrument spells out the entitlements of participants and beneficiaries, "so too must employers be able to rely on the plan's written instrument to determine their obligations." *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 981 (5th Cir. 1994) (Weiner, J., concurring). That is to say, trust agreements serve not only to empower trustees and to specify beneficiaries' rights, but as well to put employers on notice as to their obligations.

The flaw in the Second Circuit's decision is magnified against this historical backdrop. The court below made two fundamental errors. First, as a matter of law, Glover was bound by the Trust Agreement even if it did not sign it. Second, the contracts Glover entered into with Local 282 cannot diminish the power of the Funds' Trustees as set forth in the Trust Agreement.

As to the second point, the Second Circuit held that "by undertaking in a collective bargaining agreement to pay contributions to certain benefit funds," Glover did not bind itself to the Trust Agreement. (A-9) Such a holding implies that Glover had the power to shape the terms of the Trust Agreement by means of its contracts with Local 282. That is, according to the Second Circuit, Glover could *nullify* the powers of the Trustees as set forth in the Trust Agreement by contracting with Local 282 only over the bare responsibility to pay contributions. Yet, it is well-established that "neither an employer nor a union, singly or together, can alter the terms of a trust instrument." *Sinai Hospital of Baltimore, Inc. v. National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562, 567 (4th Cir. 1982) (citing *NLRB v. Driver Salesmen*, 670 F.2d 855 (9th Cir. 1982)). Of course, decisions like *Sinai* simply reinforce the principles, discussed above, that trustees have different interests from unions and employers (in that trustees alone are charged with the duty of protecting beneficiaries and participants by collecting contributions), are independent from unions and employers, and are solely responsible for determining the contents of trust agreements.

As to the first point, the Second Circuit held that Glover did not bind itself to the terms of "a governing trust agreement to which it never agreed." (A-9) However, as has been demonstrated, regardless of whether Glover signed the Trust Agreement, by agreeing to make contributions to the Funds, Glover set in motion elaborate ERISA mechanisms through which the Funds' Trustees were obligated *and empowered* to collect the contributions that Glover promised to pay. In the case at hand, Glover challenged the Funds' right to audit Glover's records and refused to abide by the Trust Agreement's formula for estimating contributions owed when records are not produced, while Glover accepted the Trust Agreement's requirement that remittance reports be submitted. Of course, Glover had no right to pick and choose from among the Trust Agreement provisions.

Glover's refusal to accept the Trust Agreement's formula for estimating contributions is a perfect example of the danger benefit funds can face when employers defy the rules governing those funds. As already explained, the Funds impose this formula when employers submit remittance reports, but fail to produce for audit pertinent books and records. While the Second Circuit saw the importance of the right to audit, it did not acknowledge the role of the Trust Agreement's formula in enabling the Funds' Trustees to fulfill their obligation to collect contributions. (A-6-8)

However, the Trust Agreement's formula is essential in instances in which employers fail or refuse to produce proper records for audit. After all, absent an audit, the Trustees would face an onerous, if not impossible, task of judging the accuracy of information contained in an employer's remittance reports.

The Trust Agreement's formula supplied a means of estimating contributions owed by Glover. Incredibly, Glover's contention throughout this litigation has been that it should have to pay only a $10/employee fine to the Department of Labor, pursuant to Section 209(b) of ERISA, 29 U.S.C. § 1059(b), as a penalty for its recordkeeping violations. If Glover's solution were accepted, offending employers would be free to pay whatever contributions they pleased and then destroy records, or never maintain them in the first place, with essentially no repercussions. Yet, the Second Circuit's decision, by sanctioning Glover's bid to escape the Funds' rules, including the Trust Agreement's formula, would produce exactly this result, to the severe detriment of the participants and beneficiaries whom ERISA was enacted to protect, as well as employers who comply with the rules.

In sum, according to the Second Circuit's decision, an offending employer can refuse to take any step required by a plan's trustees for the purpose of fulfilling their fiduciary duties to participants and beneficiaries. In so refusing, such an employer would be preventing the plan's trustees from meeting the standards of care and loyalty, from acting solely in the

interest of participants and beneficiaries, from determining exactly what property forms the subject-matter of the trust and who are the beneficiaries, from using reasonable diligence to discover the location of trust property and to take control of it without unreasonable delay, and generally from ensuring that assets of the plan do not inure to the benefit of the employer.

In finding that an employer who contributes to benefit trust funds is not bound as a matter of law to the terms of the governing trust documents, the Second Circuit's holding frustrates Congress' purpose in enacting ERISA, and conflicts with this Court's decisions defining the obligations and powers of fund trustees. Therefore, the Second Circuit's decision should be reviewed and reversed.

II

THE SECOND CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE HOLDINGS OF BOTH CIRCUIT COURTS OF APPEALS THAT HAVE PREVIOUSLY ADDRESSED THE ISSUE AT HAND

Prior to the Second Circuit's decision in this case, both the Ninth and Eleventh Circuits had held unequivocally that if an employer makes contributions to an ERISA benefit fund, it is bound as a matter of law to the terms of the trust agreement governing the fund, even if it is not a signatory to said trust agreement. *See Vertex*, 932 F.2d 1443, and *Miramar*, 920 F.2d 1491. Therefore, the Second Circuit's decision stands squarely in conflict with prior Circuit holdings.

In short, the courts in both *Miramar* and *Vertex* reasoned as follows: a) by making contributions to trust funds, employers intend their employees to receive benefits from those funds; b) employers gain when their employees receive benefits; c) in intending their employees to be covered by trust funds, with the attendant benefit to both employees and employers, it must be concluded that employers subject themselves to the rules of the trust funds. *Vertex*, 932 F.2d at 1451; *Miramar*,

920 F.2d at 1494. *See also Malden Mills Industries, Inc. v. Alman*, 971 F.2d 768, 776 (1st Cir. 1992); *New York State Teamster Conference Pension and Retirement Fund v. Boening Brothers, Inc.*, 891 F. Supp. 81, 86 (N.D.N.Y. 1995); *Chicago Area I.B. of T. Funds v. Thomas S. Zaccone Wholesale Produce, Inc* ., 874 F. Supp. 188, 192 (N.D. Ill. 1995).

The Second Circuit acknowledged that the opinions in *Vertex* and *Miramar* "used broad language that would cover this case," but attempted to distinguish those opinions, nonetheless. (A-7) In particular, the court stated that the Ninth and Eleventh Circuits had been considering trust provisions granting trustees the right to audit employers' records. The Second Circuit characterized the provision in the case at hand as "of far less importance to the fund trustees' performance of their duties than their right to audit . . . "[8] (A-7-8) Second, the court stated that the Eleventh Circuit in *Vertex* had relied on language in the trust agreement at issue that provided that any employer contributing to the trust fund would be bound by the trust agreement. As the Second Circuit stated, the Funds' Trust Agreement by contrast provides that an "Employer" is one who is a signatory to the Agreement or "agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust." (A-8)

Both of the Second Circuit's attempts to distinguish *Vertex* and *Miramar* miss the mark. First, neither Circuit limited its holding to trust provisions identifying the right to audit employers' books and records. In *Miramar*, the Ninth Circuit expressly identified the right to audit as only one instance of a rule to which the employer at issue was bound to submit as a result of having made contributions to the trust fund:

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[8] The Second Circuit also noted that the benefit funds in *Vertex* and *Miramar* may have been entitled to the relief they sought under ERISA, even if the trust agreements in question did not apply. (A-7 n. 3) It need only be said in reply that neither the Ninth Circuit nor the Eleventh Circuit chose to grant relief on this ground.

> Miramar and its employees cannot receive the benefits of the Fund yet escape its attendant burdens, in this case, the provision of the Trust Agreement permitting the Trustees to audit an employer's books and records.

920 F.2d at 1494. Similarly, in *Vertex*, the court made it clear that the trust provision regarding audits was not the only one to which the company would be bound:

> We fail to see how Vertex can avail itself of the benefits of the Funds without also being subjected to the rules that govern them.

932 F.2d at 1451.

In any event, as discussed in the prior section, the Trust Agreement's formula is an essential companion to the right to audit. That is, the formula is a means for the Funds to estimate contributions owed when employers refuse to cooperate with audits. Thus, the formula is exactly the sort of rule that the Ninth and Eleventh Circuits would have had in mind when they held that an employer who receives benefits for its employees from a trust fund must abide by that fund's rules.

The Second Circuit's focus on the language of the trust agreement in *Vertex* is also misplaced. To begin with, while the Eleventh Circuit did mention that the trust agreement in that case purported to bind employers who contributed to the benefit funds, it simply did not found its holding on that fact. 932 F.2d at 1451. To do so would have been difficult. After all, given that Vertex had never signed the trust agreement in that case, the agreement's attempt by contract to bind employers who contributed to the funds had to fail. That is, the trust agreement could not transform a non-signatory into a signatory simply by proclaiming it so. On the other hand, Vertex *had* signed the applicable collective bargaining agreement, and so the Eleventh Circuit closely examined the collective bargaining agreement to see if it incorporated the trust agreement. 932 F.2d at 1448-1450. Because it did not,

the court was left to determine if Vertex was bound to the trust agreement by law.

As already stated, the Eleventh Circuit determined just that, holding that Vertex was bound *by law* to the trust agreement as a result of having made contributions to the trust funds. *Vertex*, 932 F.2d at 1451. In arriving at this decision, the court relied on much of the Supreme Court precedents discussed in the previous section. The Eleventh Circuit pointed out that a holding that Vertex was not bound to the trust agreement would be tantamount to allowing "employers and unions to bargain away the rights and powers of fund trustees in agreements to which the trustees were not a party." *Id.* Such a result would be inconsistent with the "recognition by other courts that trust funds are independent of the employers that contribute to them and the union employees who benefit from them." *Id.* Here, the court in *Vertex* cited to *Miramar*, as well as to this Court's conclusions in *Central Transport* that only fund trustees have a clear duty to police employer contributions, and that this duty is an onerous one. *Vertex*, 932 F.2d at 1450-1451. The Eleventh Circuit also pointed to this Court's invocation of Section 403 of ERISA, 29 U.S.C. § 1103, to the effect that ERISA vests exclusive authority and discretion to manage plan assets in the trustees alone, and not the employer or union. Finally, the court emphasized that the position taken by Vertex would "result in underfunded plans that could not pay appropriate benefits to their beneficiaries." *Vertex*, 932 F.2d at 1451. This in turn would place funds in an untenable position, given their responsibility to pay benefits even if contributions are not received. *Id.*

To underscore the Second Circuit's error in focusing on the language of the trust agreement in *Vertex*, the decision in *Miramar* should also be examined. In that case, the trust agreement stated that the term "Employer" referred to employers who had signed the trust agreement, as well as "'such other employers who, by contract with the Union, have agreed to be bound by the terms of this Trust Agreement *and* to make contributions to the Fund equal to and on the same basis and under the same conditions as those required to be made by the

employers signatory hereto.'" *Miramar*, 920 F.2d at 1493. As can be seen, in spite of the reference by the trust agreement in *Miramar* to the payment of contributions, the agreement did specify that an employer had either to have signed the trust agreement or have agreed to be bound by it through a contract with the union. Nonetheless, although Miramar had *not* signed the trust agreement and had *not* signed a collective bargaining agreement incorporating the trust agreement, the court concluded that Miramar was indeed bound by the trust agreement, as it "cannot receive the benefits of the Fund yet escape its attendant burdens." *Id.* at 1494. In short, the descriptive language concerning "Employer" was not significant to the Ninth Circuit.[9]

Strikingly, in *Miramar*, the collective bargaining agreement not only did not incorporate the trust agreement, but could reasonably have been read to disavow it. After setting out the contributions Miramar was required to pay to the trust fund, the collective bargaining agreement stated:

> 'The foregoing is the extent of any and all of employer's obligations to the Santa Monica Culinary Welfare Fund, and otherwise under this Article.'

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[9] It is worth pointing out that in concluding that the employer in *Miramar* was bound by the trust agreement, the court noted that the trust agreement defined "Employee" as "Any person within the jurisdiction of the Union employed by an Employer bound by this Agreement, covered by a collective bargaining agreement between his or her Employer and the Union." 920 F.2d at 1494.

Similarly, the Trust Agreement, Article I, Section 3, in the present case defines "Employees" as "all Employees covered by and who fulfill the conditions of the collective bargaining agreements in effect between the Employers and the Union."

Again the precise definitions are not what is significant here. Rather, it is a simple matter of common sense that the employees whose benefits are defined in the Trust Agreement *are the employees of employers*. Glover simply cannot maintain that its employees were entitled to benefits as employees of Glover, and yet Glover was not an employer under the collective bargaining agreements and the Trust Agreement.

920 F.2d at 1492. However, the Ninth Circuit noted that this language did not "expressly disaffirm" the Trust Agreement and, moreover, was "silent on the rights and powers of the Trustees."[10] 920 F.2d at 1494. In any event, the court concluded that the intent of Miramar to be bound or not bound by the trust agreement was not a fit subject for further fact-finding. Rather, the court stated:

> There is no contention that Miramar agreed to make significant contributions to the Fund but did not intend its employees to be covered thereunder. It is clear that by making contributions to the Fund, Miramar intended its employees to receive benefits from the Fund. Once Miramar intended its employees to be covered by the Fund, the Trust Agreement governing the Fund requires Miramar to be bound to its terms.

Id.

In other words, what mattered to the Ninth Circuit was not the language of the collective bargaining agreement or the trust agreement, but the fact that Miramar had made contributions to the fund. Allowing Miramar to limit its obligations to the trust funds according to the terms of the collective bargaining agreement would have meant the following:

> If the provision at issue [in the collective bargaining agreement] is read as interfering with the Fund's right to audit Miramar's books, we would be altering the trust documents. Such a holding is contrary to Supreme Court and circuit authority stressing the independent relationship between a trust fund, an employer, and a union.

920 F.2d at 1494-1495 (citations omitted).

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[10] The collective bargaining agreements between Glover and Local 282 also did not disaffirm the Trust Agreement. Rather, they simply set forth contribution rates.

As has been demonstrated, the Second Circuit's efforts to distinguish its holding from those of the Ninth and Eleventh Circuits were unsuccessful. In holding that Glover was not bound to the Funds' Trust Agreement as a matter of law as a result of making contributions to the Funds, the Second Circuit created a clear and irreconcilable conflict amongst the circuits, one that should be resolved by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84—August Term, 1995

(Argued: October 6, 1995 Decided: March 18, 1996)

Docket No. 95-7137

JOSEPH JASPAN, ROBERT A. SASSO, MICHAEL CARBONE, ANDREW BOGGIA, JACK DEE, ALFRED FINKEL, THEODORE KING, CHESTER BROWMAN, JOHN QUADROZZI, as Trustees and Fiduciaries of the Local 282 Welfare, Pension and Annuity Trust Funds,

Plaintiffs-Appellants,

—v.—

GLOVER BOTTLED GAS CORPORATION, and SYNERGY GAS CORPORATION,

Defendants-Appellees.

Before:

WINTER, JACOBS, and LEVAL,

Circuit Judges.

Appeal by plaintiff employee-benefit funds from denial by the United States District Court for the Eastern District of New York (Raymond J. Dearie, *J.*), of their claim for monetary relief in a suit to compel an employer to produce work records for audit.

Affirmed.

EUGENE S. FRIEDMAN, New York, N.Y., (William Anspach, Friedman, Levy & Warren, New York, N.Y., Of Counsel), *Attorneys for Plaintiffs-Appellants.*

ELLIOT J. MANDEL, Jericho, N.Y., (Thomas J. Bianco and Carmelo Grimaldi, Kaufman, Nanes, et al., Jericho, N.Y., Of Counsel), *Attorneys for Defendants-Appellees.*

LEVAL, *Circuit Judge:*

This appeal arises out of a suit by the Trustees and Fiduciaries of the Local 282 Welfare, Pension, and Annuity Trust Funds (the "Funds") against Glover Bottled Gas Corporation (now known as Synergy Gas Corporation) ("Glover"). The complaint seeks to compel Glover to produce its books and records for audit. In the Course of litigation, the Funds asserted in motion papers that they were also entitled, under the terms of the trust agreement governing the Funds, to monetary relief in the amount of 50% of Glover's contributions, by reason of Glover's failure to keep records. The district court awarded judgment to the Funds on their claim to compel the production of Glover's records, but denied monetary relief. The Funds appeal the latter part of the district court's decision. We affirm.

Background

The Funds are employee benefit plans as defined by the Employment Retirement Income Security Act of 1975 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq. See* 29 U.S.C. § 1002(3). A. 296. They provide retirement, health, and other benefits to the employees of various employers who make contributions to the Funds pursuant to collective bargaining agreements with Building Material Teamsters Local

282 ("Local 282"). A. 296. The Funds are administered in accordance with ERISA and the terms of an Agreement and Declaration of Trust (the "Trust Agreement").

Glover signed collective bargaining agreements with Local 282, covering the period from March 1977 through July 1982, under which it agreed to make contributions to the Funds for the benefit of its employees. A. 131-157. Pursuant to the collective bargaining agreements, Glover submitted, together with it contributions, monthly remittance reports stating the hours worked by covered employees and, correspondingly, the amount Glover owed in contributions to the Funds. A. 339-434.

In accordance with ERISA, the Funds periodically conduct audits of participating employers to ensure that their contributions meet the terms set forth in the collective bargaining agreements.[1] As early as 1978, the Funds disputed whether Glover had made contributions in accordance with its obligations and whether Glover should be considered bound by the terms of the Trust Agreement, which Glover had never signed. A. 261-63. In 1978, the Funds sued Glover in the New York Supreme Court for Nassau County, seeking contributions allegedly due to the Funds and reformation of Glover's collective bargaining agreement to provide that Glover would be bound by the terms of the Trust Agreement. A. 268-73. The suit was settled and discontinued. A. 279-80.

In June 1985, the Funds initiated this lawsuit under provisions of ERISA, 29 U.S.C. § 1132(a)(3), and the Labor Management Relations Act, 29 U.S.C. § 185, to compel Glover to produce its records for audit. A. 299. The complaint did not include any allegation of underpayment of contributions. *See* 29 U.S.C. § 1145. Discovery and various pretrial proceedings were conducted before a magistrate judge through 1986. A. 3.

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[1] ERISA provides that "every employer shall . . . maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." 29 U.S.C. § 1059(a)(1). *See also id.* at § § 1023(a)(3)(A), 1023(b)(2).

On November 11, 1988, the Funds moved for summary judgment, seeking to compel Glover to produce its records. A. 12-13. In response, Glover claimed that the relevant records no longer existed (A. 201-203, 206-216) and that , as a result, the Funds' action was moot. A. 201. In their Reply Memorandum (A. 220), the Funds asserted that Glover's loss of the documents did not render the action moot because "the Funds have also requested and intend to seek other equitable relief in the form of approximate underpayments and the Funds' costs and reasonable attorneys' fees . . . . " A. 223. The Reply Memorandum stated that "A Finding of Liability Is Relevant to the Funds' Claim for Approximate Underpayments." A. 223. It explained that Section 1132(a)(3)(B) of ERISA provides that a court may award "other appropriate equitable relief" to redress violations of the Act, that the loss of Glover's payroll records prevented the Funds from correctly determining the amount of Glover's underpayments, and that the governing Trust Agreement provided a remedy by setting the total contributions due from an employer who fails to produce records for audit at 50% above the amount of contributions reported. A. 223-24. Accordingly, the Funds argued that their motion for judgment on the claim to compel Glover to produce its documents was not moot, regardless of Glover's inability to produce, because "it is a prerequisite to providing the Funds equitable relief in the form of approximate damages of an additional 50% of the reported contributions." A. 225.

The Funds, however, had never pleaded a claim for unpaid contributions, had never pleaded their entitlement under the Trust Agreement to the 50% supplement, and, indeed, had never mentioned this alleged entitlement in the litigation prior to their Reply Memorandum on their motion for summary judgment. Accordingly, Glover had not had an opportunity to reply to this contention when the district court convened on December 16, 1988, to rule on the motion. A. 324. Glover's papers before the court, therefore, did not include argument to the effect that (a) Glover was not a signatory to the Trust Agreement and (b) the action did not involve a claim for unpaid contributions. The district judge, who had read the motion papers, opened the conference advising Glover that it was

liable for the 50% payment. A. 325. After brief further discussion, the judge stated he would grant summary judgment, including the 50% penalty, but delay entry for 30 days to give Glover a last opportunity to find the records. A. 330, 334.

In early January 1989, Glover submitted a motion for reargument. A. 245-46. In this motion, Glover asserted that the Funds had never claimed entitlement to the 50% supplement by pleadings or otherwise until the filing of its Reply Memorandum on its motion for summary judgment, that Glover was neither a party nor a covered employer under the terms of the Trust Agreement, that the sole penalty under ERISA for failure to maintain records was a provision in 29 U.S.C. § 1059 for a civil penalty of $10 per employee payable to the Secretary of Labor, and that no penalty should be imposed in view of the non-willful nature of Glover's failure to produce. A. 248, 309.

A few days later, Glover informed the district court that it had found some of the records thought to be missing (A.460). The court granted a further stay pending an audit of the records by the Funds. A. 460. The Funds contend that they were unable to complete the audit because Glover failed to produce records for 51 of 71 months in question (A. 454), and because some of the records it provided contained material omissions. A. 447-450, A. 452-453. The Funds' auditor concluded that Glover owed $25,717.67 for the 20 months for which records were produced. A. 454. Still, the Funds did not amend their complaint to plead a claim for unpaid contributions for those 20 months, or, by extrapolation, for the entire 71 months.

The parties submitted additional briefing to the court primarily addressing the liability of a non-signatory contributing employer for the remedies specified in a trust agreement. A. 495-502. The court also requested and received further briefing on the question whether the penalty provided by 29 U.S.C. § 1059 was exclusive of other remedies. A. 483, 492.

On January 5, 1995, the district court ruled that the Funds were entitled to judgment in their action to compel production of Glover's records, but that, in a suit for violation of

recordkeeping requirements, the court had no authority to award "damages" of 50% of reported contributions, as provided in the Trust Agreement, against one who was not a party to that Agreement. A. 516.

The Funds appealed from the court's failure to award monetary relief in the amount of 50% of contributions.

Discussion

On appeal, the Funds contend that (1) Glover was bound by the terms of the Trust Agreement to pay 50% of its contributions by reason of its failure to produce its records, and (2) even if it was not so bound through the Trust Agreement, the court should have awarded the 50% penalty, exercising its power to grant equitable relief under ERISA, 29 U.S.C. § 1132(a)(3)(B). We are not persuaded by either argument.

Glover was not a party to the Trust Agreement. Had the parties intended to bind Glover to its terms, they could easily have done so by having Glover sign the Agreement or by referencing it in the collective bargaining agreements. It is true, Glover had agreed through the collective bargaining agreements to pay contributions to the Funds. But this does not justify holding Glover to the terms of a liquidated damages provision of a trust agreement that it never joined in.

The Funds point to decisions in other circuits, which have held non-signatory contributing employers to terms of trust agreements governing the fund to which they contributed. *Plumbers & Steamfitters Local 150 v. Vertex Constr. Co.*, 932 F.2d 1443 (11th Cir. 1991); *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp.*, 920 F.2d 1491 (9th Cir. 1990).[2] These cases held that an employer, which was bound by its collective bargaining agreement to contribute to a benefit fund but had not signed or agreed to be bound by the

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[2] Plaintiffs also cite *Malden Mills Industries, Inc., v. Alman*, 971 F.2d 768, 776 (1st Cir. 1992). However, as we read this decision, the court merely recited the Eleventh Circuit's holding in *Vertex* as part of its explanation of the plaintiff-fund's contentions, without passing on the issue.

trust documents, was nonetheless responsible for an obligation imposed on contributing employers by the trust agreement. *Vertex,* 932 F.2d at 1450; *Miramar,* 920 F.2d at 1493-94. Although the *Vertex* and *Miramar* opinions used broad language that would cover this case, (e.g., "We fail to see how [the employer] can avail itself of the benefits of the [f]unds without being subjected to the rules that govern them." *Vertex,* 932 F.2d at 1451), both courts justified their rulings by pointing to factors not present here. The provision of the trust agreement which those courts enforced against the non-signatory employer was the right of the fund trustees to audit the employer's records. Fund trustees have a fundamental duty to locate and take control of fund property-- a duty for which the right to audit is crucial. *Vertex, 932 at 1450-51; see also Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472* U.S. 559, 571-72 (1985).

Here, in contrast, the Funds are seeking to enforce a liquidated damages provision. Such a provision may be helpful to the trustees, but it is not essential to their management of the Funds in the same way as is the right to audit to make sure contributing employers have contributed in accordance with their obligations.[3] Despite the broad language in their opinions, we have no confidence that the Ninth and Eleventh Circuits would have held a non-signatory contributing employer liable had the trust provision in question been, as here, one for liquidated damages-- a provision of far less importance to the fund trustees' performance of their duties than their right to

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[3] Indeed, the funds in *Vertex* and *Miramar* may have been entitled to this relief under ERISA, regardless of the terms of the trust agreement. *See* 29 U.S.C. § 1059(a) (recordkeeping and reporting requirement); 29 U.S.C. § 1001(b) (general disclosure requirement); *see also Central States,* 472 U.S. at 571 ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled . . . ."); *Combs v. King,* 764 F.2d 818, 822-23 (11th Cir. 1985) ("The legislative history of ERISA demonstrates that it was enacted, at least in part, to increase the information and data available to participants . . . . Obviously, employers were to play integral roles in the disclosure process.").

audit, and one which raises far greater concerns regarding the fairness of imposing contract liability on a non-signatory.

The court in *Vertex* also relied in part on the fact that the trust agreement at issue expressly purported to cover any employer who, pursuant to a collective bargaining agreement, contributed to the fund, "whether or not any such contributing Employer has signed this [trust] Agreement . . . ." *Vertex*, 932 F.2d at 1446. Thus an employer who examined the *Vertex* trust agreement before undertaking the obligation to contribute under the collective bargaining agreement might arguably understand that the obligations of the collective bargaining agreement implicated the obligations of the trust agreement. Here, in contrast, had Glover examined the Trust Agreement, it would have understood it was not bound by the obligations set forth, for the Agreement defines an obligated employer as one who

> has duly executed a collective bargaining agreement with the Union *and who is a signatory to this agreement*, and also any employer not presently a party to such collective bargaining agreement, who hereafter executes such agreement provided that such employer satisfies the requirements for participation as established by the Trustees *and agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust, and becomes party hereto.*

Joint Appendix at 255 (emphasis added). A 255. As Glover was neither a "signatory" nor one who "agrees to be bound by the terms and provisions of [the Trust] Agreement," the terms of the Trust Agreement apparently excluded it from coverage. Thus, were we to follow *Vertex* and hold that Glover, by undertaking in the collective bargaining agreement to pay contributions to the Funds, had bound itself to the provisions of the Trust Agreement governing the Funds, it would be arguable that Glover was expressly exempted from obligation by this provision of the Trust Agreement.

We conclude in any event that, by undertaking in a collective bargaining agreement to pay contributions to certain benefit funds, Glover did not bind itself to a liquidated damages provision contained in a governing trust agreement to which it never agreed.

We also reject the Funds' second argument-- that the court erred in its refusal to award to 50% relief the Funds were seeking under its power to grant "appropriate equitable relief" pursuant to 29 U.S.C. § 1132(a)(3)(B).

First, this was not a suit for unpaid contributions. The only allegation pleaded by the Funds was Glover's failure to submit its books for audit; the only specific prayer for relief was for "An Order directing [Glover] to present its relevant books and records to the Funds' auditor for examination." A. 299. We express no view as to whether, *in a suit for unpaid contributions,* ERISA's provision for "appropriate equitable relief" would authorize an award of 50% of contributions, or other liquidated damages, paid in the nature of restitution.[4]

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[4] *See Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068-69 (1993) (noting that restitution may be an appropriate equitable remedy in an ERISA case); *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir.) (characterizing employer's payment of back pay as a form of restitution), *cert. denied*, 116 S. Ct. 77 (1995); *Howe v. Varity Corp.*, 36 F.3d 746, 756-67 (8th Cir. 1994) (holding that lost pension benefits could be recovered in equitable restitution action because this was "money that plaintiffs would have received"), *cert. granted*, 115 S. Ct. 1792 (1995); *Gulf Line Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) (noting that an action to enforce ERISA's "appropriate equitable relief" provision "means an action to compel someone to do something . . . , such as make contributions, that ERISA or the plan requires be done."); *Trustees of the Building Services 32B-J Pension, Health & Annuity Funds V. Linden Realty Assocs.*, 1995 WL 302454 *5 (E.D.N.Y. 1995) ("[A]n employee benefit fund can recover moneys owed to it by an employer according to the equitable remed[y] of restitution . . . ."); *Aetna Life Ins. Co. v. John Hancock Mutual Life Ins. Co.*, 1994 WL 494780 (N.D. Ill. 1994) (holding that plaintiffs attempting to enforce payment under terms of plan sought restitution).

Second, although 29 U.S.C. § 1132(a)(3)(B) entitles fund trustees to "appropriate equitable relief" if an employer violates ERISA's recordkeeping requirement, 29 U.S.C. § 1059, the Funds made no request for any specific form of monetary equitable relief other than the 50% penalty provided by the Trust Agreement (which would have been an arbitrary and inappropriate remedy on these facts). We therefore find the district court's denial of the Funds' requested relief altogether appropriate.

Conclusion

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JASPAN, ET AL.

Plaintiff,

- against - **AMENDED ORDER**

GLOVER BOTTLED GAS CORP., ET AL., CV 85 2089 (RJD)

Defendant.

----------X

DEARIE, District Judge.

Plaintiffs initially brought suit to compel production and auditing of employee work records required to be maintained by defendants pursuant to 29 U.S.C. § 1059. When defendants indicated that such records could not be located, plaintiffs requested that they be awarded "approximate damages of an additional 50% of the reported contributions."

On December 16, 1988, the Court indicated that it was inclined to grant plaintiffs' motion for summary judgment and require defendants to pay plaintiffs an amount equal to fifty percent of defendants' contributions to the Funds for the period of October 9, 1978 through October 9, 1984. The Court deferred entry of the judgment to allow defendants to produce the records. No final judgment was ever entered.

Plaintiffs subsequently moved for an entry of judgment ordering defendants to produce the records and to pay "damages" of fifty percent of the reported contributions. Plaintiffs contend that the Court has the power to award such "damages" under 29 U.S.C. § 1132(a)(3)(B), which authorizes the award of "appropriate equitable relief" when defendants have violated a provision of ERISA. However, plaintiffs have offered absolutely no support for the proposition that the

Court has the power to order a non-signatory to a trust agreement to pay "damages" to plaintiffs for violation of record-keeping obligations. The only monetary sanction ERISA authorizes for the violation of such obligations is the $10 per employee civil penalty provided for in 29 U.S.C. § 1059. Contrary to the Court's suggestion at the December 16, 1988 conference, the Court has no authority to order the defendants to pay "damages" to the plaintiffs.

The Court grants summary judgment with respect to plaintiffs' initial motion to compel production of employee work records. The Court rejects the plaintiffs' request that the Court award "damages". This case is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
January 5, 1995

/s/ Raymond J. Dearie

RAYMOND J. DEARIE
United States District Judge

STATUTORY PROVISIONS OF ERISA

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power.

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free

flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

§1023. Annual reports

(a) Publication and filing

* * *

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountants.

§1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who--

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 203(b)(3)(A) [29 USCS @ 1053(b)(3)(A)]).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence.

* * *

(b) If any person who is required, under subsection (a), to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

§1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

§1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) [29 USCS @ 1102(a)] or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets.

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 and 4044 [29 USCS @@ 1342, 1344] (relating to termination of insured plans), or under section 420 of the Internal Revenue Code of 1986 [26 USCS @ 420] (as in effect on January 1, 1995), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 403(c) and (d) [29 USCS @ 1103(c) and (d)], 4042 [29 USCS @ 1342], and 4044 [29 USCS @ 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and

instruments are consistent with the provisions of this title and title IV.

§1106. Prohibited transactions

(a) Transactions between plan and party in interest.

Except as provided in section 408 [29 USCS @ 1008]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS @ 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS @ 1107(a)].

(b) Transactions between plan and fiduciary.

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests

of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

§1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation.

Except as otherwise provided in this section and section 414 [29 USCS @ 1114]:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

§1132. Civil enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought--

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;